EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

(DS516)

RESPONSES OF THE UNITED STATES TO THE EUROPEAN UNION'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

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EC – Fasteners (China) (Article 21.5) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW adopted 12 February 2016
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – OCTG (Korea) (Panel)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R, adopted 12 January 2018

1 ARTICLE VI OF THE GATT 1994 (INCLUDING THE AD NOTES) AND ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

Question 1. The EU position is that the *Ad Note* to Article VI:1, second paragraph is not in the nature of an *affirmative defence*. We do not have a clear understanding of China's position on this issue, which we consider remains ambiguous. Please state and explain your views on this issue.

1. The United States agrees with the EU position that the Second Note *Ad* Article VI:1 is not an affirmative defense.[1]

2. The text of the Second Note is expressed as a description, or recognition, by Members: "It is *recognized* that, in [the situation described], special difficulties may exist in determining price comparability." The text uses no language expressing that it is an exception or derogation from Article VI.

3. The text of the Second Note also provides no *authorization* for an action in response to the recognition of the situation described in it. Instead, the Second Note recognizes that the importing Member exercises judgment as to whether use of domestic prices is "appropriate": "[I]n such cases importing contracting parties *may find it necessary to take into account* the possibility that a strict comparison with domestic prices in such a country *may not always be appropriate*."[2]

4. Finally, the text of the Second Note describes a situation in which difficulties exist "in determining price comparability for the purposes of paragraph 1" of Article VI, confirming that the authority to "determin[e] price comparability" exists in Articles VI:1 and VI:2. The Second Note thus confirms that it is Articles VI:1 and VI:2 of GATT 1994, not the Note itself, that provide the legal authority to reject the non-market prices and costs.

5. For these reasons, the Second Note cannot be considered an exception, in the nature of an affirmative defense, with respect to the obligations set out in Article VI of GATT 1994. It is rather an elaboration of the obligations by which all Members have agreed to be bound pursuant to that article.

Question 2. The EU position is that the references to "comparison/compare/ comparability" in Article VI of the GATT (including the Ad Notes), Article 2 of the Anti-Dumping Agreement and Section 15 of China's Accession Protocol (we count thirty-five of them) *always refer to the comparison between normal value and export price*. We understand that China agrees. In case you have a different view, please state and explain such view.

[1] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 4.7-4.9.

[2] Italics added.

6. The United States agrees with the EU position.[3] In anti-dumping proceedings, the focus of "price comparability" is to ensure comparability between normal value and export price, and comparability is only ensured when the comparison between normal value and export price is capable of producing a meaningful answer to the question of whether there is dumping.[4] Please see the U.S. response to EU questions 3 and 4 for further discussion of the U.S. position.

Question 3. The EU position is that the term "price comparison" refers to the comparison between normal value and export price *irrespective of how normal value is established* (domestic prices, price to a third country or *costs*), as reflected in the second sentence of Article VI:2 of the GATT 1994, and in any event given that the export price is always a price (it is never constructed on the basis of costs of production). We understand that China's position on this issue, whilst remaining unclear to us, is that the term "price" narrows the concept of comparability to situations in which normal value is established on the basis of domestic prices or of price to a third country. Please state and explain your views on this issue.

7. The United States agrees with the EU position that the term "price comparison" refers to the comparison between normal value and export price. Article VI:1(a) and (b) of GATT 1994 specifies that normal value is a "comparable price, in the ordinary course of trade."[5] Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which are themselves prices between input suppliers and the producer under investigation).[6]

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[3] *See, e.g.,* European Union's First Written Submission, paras. 20, 24, 42-44, 46-47; European Union's Opening Statement at the First Panel Meeting, paras. 54-56. China appears to agree in principle that the notion of price comparability refers to the comparison between export price and normal value. *See* China's Opening Statement at the First Panel Meeting, para. 78 ("The ADA and Article VI of the GATT 1994 require that export price and the normal domestic price be compared in an apples-to-apples manner that accounts fully for any differences that affect price comparability.").

[4] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 1.1, 4.9, 8.5-8.6.5.1, and Section 5.

[5] GATT 1994 Art. VI:1(a), (b): "For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the *comparable price, in the ordinary course of trade*, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest *comparable price* for the like product for export to any third country *in the ordinary course of trade*, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit" (italics added).

[6] Normal value may be based on costs determined in accordance with Article VI of GATT 1994 and the Anti-Dumping Agreement. Where input prices are not market-determined, and thus are not themselves comparable prices in the ordinary course of trade, those prices (costs) would not be suitable to establish a normal value based on those costs. *See, e.g., EU – Biodiesel (AB)*, para. 6.24 ("In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy.").

8. Indeed, all parties in this dispute, including China,[7] recognize that in the situation described in the Second Note, non-market economy costs may be rejected and replaced, and the text of the Second Note refers to "special difficulties in determining price comparability" and that "a strict comparison with domestic prices" may not be appropriate. In both of these phrases, price comparison and price comparability encompass prices and costs in determining normal value. Section 15(a) of China's Accession Protocol contains the same acknowledgement.[8] Please see the U.S. response to EU question 4 for further discussion of the U.S. position.

Question 4. The EU position is that the requirement to ensure comparability underlies and is present in or apparent from the *entirety* of Article VI of the GATT 1994 (including the Ad Notes) and Article 2 of the Anti-Dumping Agreement. We understand that China's position on this issue, whilst unclear to us, is that the relevance of the requirement to ensure comparability is *limited* to Article VI:1, second sub-paragraph of the GATT 1994 and Article 2.4 of the Anti-Dumping Agreement. Please state and explain your views on this issue.

9. The United States agrees with the EU position that the requirement to ensure comparability underlies Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement.[9]

10. As explained in response to EU question 3, Article VI:1(a) and (b) of GATT 1994 specifies that normal value is a "comparable price, in the ordinary course of trade." Prices of an industry in which market economy conditions do not prevail are not "comparable" (i.e., similar, or of an equivalent quality[10]) to prices that are market-determined. Prices of an industry in which market economy conditions do not prevail are also not comparable prices "in the ordinary course of trade."[11] "Comparable" prices "in the ordinary course of trade" are market-determined, reflecting arm's-length transactions between buyers and sellers.[12]

11. Numerous WTO Agreement provisions confirm this understanding:

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[7] *See, e.g.*, China's First Written Submission, paras. 156-158; China's Opening Statement at the First Substantive Meeting, paras. 198, 202.

[8] China's Accession Protocol, Section 15(a): "In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China …."

[9] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Sections 3 and 7.

[10] The dictionary definition of "comparable" is "(of a person or thing) able to be likened to another; similar" or "of equivalent quality; worthy of comparison." *Oxford American College Dictionary* (Oxford University Press, 2002), p. 282 (Exhibit USA-26, p. 6).

[11] *Cf. US – Hot-Rolled Steel (AB)*, para. 142 (for example, a price for a sale may not reflect the criteria of the marketplace, such as profit-maximization).

[12] U.S. Response to EU Question 6, *infra*, which provides examples of situations where a domestic price has been rejected as a comparable price, in the ordinary course of trade, because the price does not reflect an arm's-length transaction between a buyer and a seller.

- The First Note *Ad* Article VI:1 recognizes that "[h]idden dumping by associated houses" may occur when the export price is affected by the relationship between exporter and importer. Such an export price is not market-determined and can be replaced to permit a proper dumping comparison.[13]

- Article 2.3 of the Anti-Dumping Agreement recognizes that export price may need to be "constructed on the basis of the price at which the imported products are first resold to an independent buyer" when "export price is unreliable because of association or compensatory arrangement between the exporter and the importer or a third party."[14] Article 2.3 confirms the importance of independence between buyer and seller.

- The Second Note *Ad* Article VI:1 recognizes that a proper dumping comparison requires identification of domestic prices and costs that are market-determined.[15]

- GATT 1994 Article VII:2(b) reflects a similar concern in customs valuation for market-determined prices: "'Actual value' should be the price at which … such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions."

- The Second Note *Ad* Article VII:2 elaborates: "It would be in conformity with Article VII, paragraph 2 *(b)*, for a contracting party to construe the phrase 'in the ordinary course of trade … under fully competitive conditions', as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration."[16]

12. The Anti-Dumping Agreement is, as its title suggests, an "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." In relation to determining price comparability, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price. The further elaboration of alternative methods

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[13] First Note *Ad* Article VI:1 of GATT 1994 ("Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.").

[14] Anti-Dumping Agreement, Art. 2.3 ("In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.").

[15] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 4.1-4.10.

[16] *See also* Customs Valuation Agreement, Art. 2.1 (transaction value between related buyer and seller shall be accepted provided the relationship did not influence the price).

to use for finding normal value are consistent with, and lend further support to, the interpretation of Article VI of GATT 1994 as providing authority to reject non-market domestic prices or costs.

13. For example, Article 2.1 of the Anti-Dumping Agreement retains the key elements from Article VI:1 of GATT 1994 for domestic prices to be used to calculate normal value: there must be a "comparable price, in the ordinary course of trade." Article 2.2 further specifies that alternatives to domestic market prices may be used to find normal value when, because of a "particular market situation" or a "low volume of … sales in the domestic market of the exporting country," domestic prices "do not permit a proper comparison."[17] This text reinforces that normal value must be based on prices that permit a "proper comparison." Each of these situations thus supports the conclusion that normal value must be based on prices determined under market economy conditions.[18]

14. In sum, as set out in Article 2.2 of the Anti-Dumping Agreement, a comparable price is one which will permit a "proper comparison." This requirement – that a comparable price must be market-determined, reflecting commercial practices, independence of buyer and seller, and the interaction of supply and demand – underlies the *entirety* of Article VI of GATT 1994 (including the *Ad* Notes) and Article 2 of the Anti-Dumping Agreement. The prices or costs of an industry in which market economy conditions do not prevail thus cannot be considered comparable prices for purposes of "normal value."

Question 5. The EU position is that dumping is defined as an export price that is less than a normal value established in accordance with Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, that is, on the basis of domestic prices, price to a third country or costs. We understand that China's position on this issue, whilst remaining unclear to us, is that dumping is defined as *international price discrimination*, where the term "price" does not capture a normal value based on costs. Please state and explain your views on this issue.

15. Article 2.1 of the Anti-Dumping Agreement plainly states that "a product is considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like producer when destined for consumption in the exporting country."[19] GATT 1994 Article VI:1 uses almost identical language.[20] The phrase "international price discrimination" does not appear in the text of GATT 1994 or the Anti-Dumping Agreement.

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[17] Anti-Dumping Agreement, Art. 2.2 (footnote omitted).

[18] *See also* Japan Third-Party Submission, paras. 20-31 (demonstrating that the drafters of the GATT selected the term "normal value" to represent "a value conforming to or not deviating from prices or costs formed in a standard and/or regular market, in other words, the price to be formed in a situation where the domestic market of the exporting Member operates under market economy conditions.").

[19] Anti-Dumping Agreement, Art. 2.1.

[20] Article VI: 1 of GATT 1994: By dumping, "products of one country are introduced into the commerce of another country at less than the normal value of the products" and "a product is to be considered as being introduced into the

16. The United States therefore agrees with the EU position that dumping is defined as an export price that is less than a normal value established according to the provisions of Article VI of GATT 1994 and the Anti-Dumping Agreement (irrespective of the data that has been used to establish the normal value). China impermissibly seeks to replace the actual WTO Agreement text with legally irrelevant words through its constant reference to "international price discrimination."[21]

Question 6. The EU position is that comparability must be ensured irrespective of whether or not there is a "*difference*" between the normal value side of the comparison on the one hand and the export price side of the comparison on the other hand: one can have a difference that does not affect comparability; and one must ensure comparability even if there is no "difference". We understand that China's position on this issue, whilst unclear to us, appears to be that comparability is only an issue where there is a difference, that is, only in the context of Article VI:1, second sub-paragraph of the GATT 1994 and Article 2.4 of the Anti-Dumping Agreement. Thus, we understand that China considers that a normal value based on costs, including an input cost that is, for example, the result of non-arm's length transactions (with respect to both domestic costs and prices, and export costs and prices), is a normal value that permits a proper comparison. Please state and explain your views on this issue.

17. The basic requirement of comparability flows from Article VI:1 of GATT 1994. The Anti-Dumping Agreement is, as its title suggests, an agreement on the application of Article VI of GATT 1994. In relation to determining price comparability, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price.[22] Thus the first step in ensuring whether a price or a cost is an appropriate proxy for normal value is to determine whether it is a "comparable price, in the ordinary course of trade."[23]

18. The United States has identified numerous circumstances that could lead an importing Member to conclude that a domestic price (or cost) is not in the ordinary of trade even though no "difference" exists between it and the export price:

- The domestic price for a sale does not reflect the criteria of the marketplace.[24]

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commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" or, in the absence of such domestic price, either third-country export price or costs of production.

[21] *Compare* U.S. Opening Statement at the Third-Party Session of the First Substantive Meeting of the Panel, paras. 8-10, *with* China Opening Statement at the First Substantive Meeting, para. 60.

[22] Anti-Dumping Agreement, Art. 2.1; *see* U.S. Response to EU Question 4, *supra*.

[23] GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Art. 2.1.

[24] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 7.3.2.1 (citing *US – Hot-Rolled Steel (AB)*, para. 142).

- The domestic price for a sale does not reflect normal commercial practices, such as in relation to other terms and conditions of sale.[25]

- The domestic price for a sale reflects a transaction between affiliated parties, rather than a transaction between economically independent entities and thus may not be a market-determined price.[26]

- The domestic cost for a sale of an input used in the manufacture of the product under investigation similarly reflects a non-arm's-length transaction and thus may not be a market-determined cost.[27]

19. These examples demonstrate that a price (or cost) for a sale may be considered not "in the ordinary course of trade" because of the lack of market orientation of the transaction or of the entities engaged in the transaction. These examples reinforce that where market economy conditions do not prevail for an industry, such conditions will not generate comparable prices, in the ordinary course of trade, even though there exists no "difference" in the sales transactions that led to the derivation of the domestic price (or cost) and the export price. The United States therefore agrees with the EU position that even when there are no differences between the normal value side of the comparison and the export price side of the comparison, ensuring comparability between normal value and export price is a necessary element of every anti-dumping determination.

Question 7. We understand that China considers that Article 2.2 of the Anti-Dumping Agreement *prohibits* the use of data from a third country. The European Union disagrees. Please state and explain your views on this issue.

20. The United States agrees with the EU position that Article 2.2 of the Anti-Dumping Agreement does not prohibit the use of data from a third country.[28] Nothing in the text of Article 2.2 restricts an investigating authority from considering evidence beyond the country of origin. For example, as the Appellate Body explained in *EU – Biodiesel*, when an investigating authority

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[25] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 7.3.2.2 (citing *US – Hot-Rolled Steel (AB)*, paras. 141, 143 n. 106 (noting a liquidation sale is one example of a sale between independent parties that might be considered not in the ordinary course of trade, because it "may not reflect 'normal' commercial principles.")).

[26] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 7.3.2.3 (citing *US – Hot-Rolled Steel (AB)*, paras. 141, 143 (noting that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price." (emphasis original))).

[27] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 7.3.2.3 (citing *EU – Biodiesel (AB)*, para. 6.41 (finding that in applying the second condition of the first sentence of Article 2.2.1.1., "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine … whether non-arms-length transactions or other practices affect the reliability of the reported costs.")); *US – OCTG (Korea) (Panel)*, para. 7.197 (citing the panel and Appellate Body reports in *EU – Biodiesel* and finding that an investigating authority would be entitled to disregard costs recorded in an exporter's or producer's records that do not reflect arm's length prices because they originate from sales transactions between associated or non-independent entities).

[28] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 7.

rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources can be used to arrive at the cost of production in the country of origin.[29] The Appellate Body differentiated "costs" from "information or evidence" used to establish "costs" by observing "that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin."[30] As the Appellate Body recognized, "these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country."[31]

Question 8. We understand that China considers that, even if Article 2.2 of the Anti-Dumping Agreement permits the use of data from a third country in certain circumstances, such data must be adjusted back to correspond with data in the country-of-origin, even if such country-of-origin data has already been lawfully rejected as unreliable and incapable of forming the basis for the establishment of a comparable normal value. The EU position is that data taken from a third country must be adjusted to reflect what the relevant cost *would be* in the country-of-origin *absent the factor rendering the country-of-origin data unreliable*. Please state and explain your views on this issue.

21. The United States agrees that third country data may need to be adapted in order to ensure that they are a suitable proxy for normal value. As explained in the U.S. response to EU question 7, nothing in the text of Article 2.2 of the Anti-Dumping Agreement precludes an importing Member from using third country data to evaluate recorded costs, or to adjust or replace recorded costs, when formulating the appropriate cost for an individual producer. If the Member relies on third country cost data to calculate a constructed normal value, such costs "*may* need to be adapted in order to ensure that it is suitable to determine a 'cost of production' 'in the country of origin'."[32] But a Member is not required, nor should it be required, to adapt a third country cost in a way that renders it a value that is *not* a "comparable price, in the ordinary course of trade."[33] That is, costs of production can be used for purposes of establishing normal value when they are a suitable proxy, but if those costs reflect non-market distortions, they are not themselves comparable prices, in the ordinary course of trade, and cannot be a proxy for such a price.

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[29] *EU – Biodiesel (AB)*, para. 6.70. The benchmark chosen may need to be adapted to reflect the market conditions in the origin country (*EU – Biodiesel (AB)*, para. 6.70), but as discussed in the U.S. responses to EU question 8, the benchmark would not need to be adapted to reflect what led to the rejection of country-of-origin cost in the first place.

[30] *EU – Biodiesel (AB)*, para. 6.70.

[31] *EU – Biodiesel (AB)*, para. 6.70; *see* U.S. Third-Party Submission, para. 143.

[32] *EU – Biodiesel (AB)*, para. 6.70 (emphasis added).

[33] *See* European Union's First Written Submission, para. 56 ("However, by definition, it does not need to be adjusted back to an amount that is the same as the amount that would result from use of the very data rejected as unreliable, for example when the investigating authority determines that there is a particular market situation" (emphasis omitted)).

22. For example, the Appellate Body has recognized that recorded costs may be rejected as unreliable or adjusted where they are based on artificial transfer prices between affiliated entities.[34] In such a situation, where a producer charges its affiliate an artificially low price for a production input, it is a non-arm's-length transaction, and an importing Member may substitute the transfer price of that input to reflect its real cost in the domestic market.[35] If there is no usable data for that input cost in the domestic market for one reason or another, then the importing Member may need to resort to information from outside the country of origin to determine the input cost.[36]

23. An importing Member may need to adapt information from outside the country of origin so that it reflects certain conditions in the country of origin and serves as a suitable proxy for normal value. However, a Member is not required to adapt that input price so it is the same as the domestic transaction price between the affiliated producer and input supplier, which the Member already rejected as distorted based on the affiliation relationship. This same circularity would apply if a Member was required to adapt third country cost data to include other types of distortions not reflective of independent interactions between buyers and sellers in a free market, which formed the original basis to adjust or replace those costs.[37]

24. For this reason, the United States disagrees with China's blanket assertion that "even if information taken from outside the home market may be used, it must be adapted to reflect the conditions in the home market,"[38] no matter what the circumstances. While it is true, as the EU states, that the third country data may need to be adapted to reflect what the relevant country-of-origin cost would be, it is certainly not true that the third country data would need to be adapted to reflect the non-market economic conditions or other distortion that led the country-of-origin cost to be rejected in the first place.

Question 9. The EU position is that if data is lawfully obtained from a third country and duly adjusted, and lawfully used as the basis for determining normal value, even if it differs from the data recorded in the accounts of the investigated producer*, it is not necessary to "un-adjust" back* **to distorted and unreliable data pursuant to Article 2.4 of the Anti-Dumping Agreement, by adjusting either normal value or export price. This would be *circular and defeat the purpose of rejecting the distorted data and replacing it with reliable***

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[34] *EU – Biodiesel (AB)*, para. 6.41 (explaining that an investigating authority is "'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, … whether *non-arms-length transactions* or other practices affect the reliability of the reported costs") (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400) (emphasis added); *see* European Union's First Written Submission, para. 46.

[35] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 7.9.2.5.1.

[36] *See EU – Biodiesel (AB)*, para. 6.70.

[37] *See EC – Fasteners (Article 21.5) (AB)*, para. 5.207 ("the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted").

[38] China's Opening Statement at the First Panel Meeting, para. 137 (emphasis removed).

***out-of-country data in the first place*. We understand that China's position is that such an "un-adjustment" would be necessary. Please state and explain your views on this issue.**

25. The United States agrees with the EU position that it is not necessary pursuant to Article 2.4 of the Anti-Dumping Agreement to adapt third country data that is used as the basis for determining normal value back to distorted or unreliable data.

26. Article 2.4 provides in relevant part that

> A fair comparison shall be made between the export price and the normal value. … Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

27. By its plain terms, Article 2.4 obligates an investigating authority to make a "fair comparison" between export price and normal value when determining the existence of dumping and when calculating a dumping margin. The text of Article 2.4 presupposes that, before the final comparison is made, an investigating authority has identified the appropriate normal value pursuant to Articles 2.1 and 2.2 and the appropriate export price pursuant to Article 2.3.[39] Once normal value and export price have then been established, an investigating authority will select pursuant to Article 2.4 the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).[40] Therefore, if the alleged adjustment is not a relevant difference between export price and normal value, an investigating authority is not required under Article 2.4 to make an adjustment.

28. Moreover, the reason an importing Member rejects Chinese prices and costs and resorts to data from a third country is that, because non-market economic conditions exist in China, the domestic prices and costs in China are not comparable. Accordingly, it would be illogical for an importing Member to "un-adjust' back to a non-comparable, or "distorted," value.[41]

Question 10. The EU position is that, under Article 2 of the Anti-Dumping Agreement, in ensuring a proper and fair comparison between normal value and export price, an

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[39]That said, it would be incorrect to read Articles 2.1, 2.2, 2.3, and 2.4 in isolation from each other. While there is a logical progression of inquiry in Article 2 from one paragraph to the next, an investigating authority may need to consider various paragraphs more than once, or some paragraphs at the same time, before deriving a final dumping margin.

[40] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price. *See EC –Tube or Pipe Fittings (Panel)*, para. 7.157.

[41] *See EC – Fasteners (Article 21.5) (AB)*, para. 5.207 (finding that "the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted.").

investigating authority *may not place an unreasonable burden of proof on any interested party*. We understand that China's position is that this obligation is "irrelevant" for the purposes of adjudicating this case. Please state and explain your views on this issue.

29. The United States agrees that, under Article 2 of the Anti-Dumping Agreement, an investigating authority, in ensuring a proper and fair comparison between normal value and export price, may not place an unreasonable burden of proof on an interested party. Please refer to the U.S. response to EU question 16 for further explanation of the U.S. views on this issue.

2 SECTION 15 OF CHINA'S ACCESSION PROTOCOL

Question 11. The EU position is that the terms "*consistent with*" in Section 15 indicate that a treaty interpreter must search for and prefer a harmonious and consistent interpretation of Article VI of the GATT 1994 (including the Ad Notes) and the Anti-Dumping Agreement and the SCM Agreement and Section 15 of China's Accession Protocol. We understand that China's position (as stated during the oral hearing) is that these terms "suggest difference". Please state and explain your views on this issue.

30. The United States agrees with the EU position that the terms "consistent with" set out in the first paragraph of Section 15 indicate that a treaty interpreter must search for and prefer a harmonious and consistent interpretation of Article VI of GATT 1994 (including the *Ad* Notes), the Anti-Dumping Agreement, the SCM Agreement, and Section 15 of China's Accession Protocol. Please see the U.S. response to Panel question 3 and paragraphs 8.6-8.6.4 of the legal interpretation document attached to the U.S. Third-Party Submission for a full explanation of the U.S. views on this issue.

Question 12. The EU position is that there is *no conflict* between the old or the new Section 15 on the one hand and the relevant provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement on the other hand. We understand that China's position is that there is such a conflict (although what precisely it might be remains unclear). Please state and explain your views on this issue.

31. The United States agrees with the EU position that the approach for determining normal value under Section 15 is compatible or in agreement with Article VI of GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement, and thus there is no conflict between the 'old' or the 'new' Section 15 and the relevant provisions of these other agreements.[42]

32. The title of Section 15 is, "Price Comparability in Determining Subsidies and Dumping." The introductory text of Section 15 states that "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 … and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member." Section 15(a) states that a Member shall use either of two alternatives "[i]n determining price comparability *under* Article VI of the GATT 1994 and the Anti-Dumping

[42] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 8.

Agreement."[43] Thus the text of Section 15, both 'old' and 'new,' reflects the understanding of WTO Members that anti-dumping duties would remain an appropriate response in proceedings involving Chinese imports. Section 15 elaborates Members' understanding of how price comparability for anti-dumping purposes is to be determined when faced with non-market economic conditions like those in China. Section 15 confirms that Chinese prices or costs may not be suitable for anti-dumping comparisons if market economy conditions do not prevail in China.

33. The 'old' Section 15 was significant because it introduced, at subparagraph (a)(ii), a particular standard of evidence: If the Chinese producers under investigation could not clearly show that market economy conditions prevailed in the relevant industry, the importing WTO Member could use a methodology that was not based on a strict comparison with domestic prices or costs in China.

34. The 'new' Section 15 continues to include the same basic elements as the 'old' Section 15 (apply consistent with, in determining price comparability, domestic prices or costs in China, for the industry under investigation, market economy conditions, a methodology not based on a strict comparison). The only difference between the 'new' Section 15 and the 'old' Section 15 is that the particular standard of evidence set out in subparagraph (a)(ii) no longer applies. Nothing else in Section 15 suggests that the basic requirement to ensure comparability, which flows from Article VI:1 of GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement, also no longer applies. If market economy conditions do not prevail in China, or in the industry or sector under investigation, then "comparable" prices or costs do not exist under the 'new' Section 15 for purposes of the dumping comparison, just like they did not exist under the 'old' Section 15. In that situation, an importing Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China. Therefore, contrary to China's position, the expiry of Section 15(a)(ii) does not mean that an importing Member may not ensure comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement for purposes of making a dumping comparison.

Question 13. The EU position is that the old Section 15 did not add to Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement in a horizontal sense, that is, in the sense that the old Section 15 is to be understood as outside the "four corners" (or *scope*) of Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. We understand that China's position on this issue, whilst remaining unclear to us, is that the old Section 15 extended the scope Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. Please state and explain your views on this issue.

35. The legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2.[44] That this authority exists in Article VI is reflected in legal text and consistent practice spanning decades:

[43] Italics added.

[44] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 3.

- the proposal to amend Article VI:1 and eventual adoption of the Second Note *Ad* Article VI:1 (1954-55), confirming the legal authority existed in Article VI;[45]

- the Secretariat review of Contracting Parties' application of Article VI, demonstrating a subsequent, common practice rejecting non-market prices or costs in determining normal value (1957);[46]

- the Accessions to the GATT of three non-market economies – Poland (1967), Romania (1971), and Hungary (1973) – in which the CONTRACTING PARTIES affirmed their existing ability to reject non-market prices or costs in situations other than "the case" described in the Second Note;[47]

- Article 2 of the Anti-Dumping Agreement (1995), bringing forward the key concepts from Article VI:1 and reinforcing (through terms such as "proper comparison") that market-determined prices or costs are necessary for anti-dumping comparisons;[48] and

- Section 15 of China's Accession Protocol (2001), which clarifies that domestic prices or costs will be used when "market economy conditions prevail" for the industry under investigation, but domestic prices or costs may be rejected when market economy conditions do not prevail.[49]

36. The United States thus agrees with the EU position that 'old' Section 15 did not add to Article VI of GATT 1994 or the Anti-Dumping Agreement, but instead is a specific expression of the principle that price comparability needs to be ensured as set out in those agreements.

Question 14. The EU position is that the old Section 15 added treaty language to Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement in the vertical sense, that is, in the sense of *clarifying, implementing or confirming*. We understand that China's position is that this is incorrect. Please state and explain your views on this issue.

37. The United States agrees with the EU position that Section 15, under the 'old' version and continuing under the 'new' version, clarified and confirmed the language of Article VI of GATT 1994 and the Anti-Dumping Agreement.[50]

38. In an anti-dumping determination, it is necessary to ensure comparability between normal value and export price. Comparability is only ensured when the comparison between normal

[45] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 4.

[46] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 5.

[47] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 6.

[48] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 7.

[49] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 8.

[50] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 8.5.5-8.8.

value and export price is capable of producing a meaningful answer to the question of whether or not there is dumping as defined by Article VI of GATT 1994 and the Anti-Dumping Agreement. Reading the text of Article VI:1 of GATT 1994, the Second Note *Ad* Article VI:1, GATT accession documents, and other texts leads to the conclusion that GATT Contracting Parties and WTO Members have always recognized that non-market prices or costs do not constitute or give rise to "comparable prices, in the ordinary course of trade." Non-market prices or costs are therefore not suitable for use "in determining price comparability."[51] WTO Members and China adopted this longstanding approach in Section 15 of China's Accession Protocol confirming that so long as Chinese prices and costs are *not* determined under market economy conditions, they may be rejected in determining price comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement.

Question 15. The EU position is that the old Section 15, in adding treaty language clarifying, implementing or confirming the relevant provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement, did not "*modify*" those provisions, but merely clarified, implemented or confirmed them. We understand that China's position is that the old Section 15 "modified" the provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement relating to the determination of price comparability. Please state and explain your views on this issue.

39. As noted in the U.S. responses to EU questions 12 through 14, the United States agrees with the EU position that 'old' Section 15 confirmed the language of Article VI of GATT 1994 and the Anti-Dumping Agreement. 'Old' Section 15 certainly did not modify the relevant provisions of Article VI of GATT 1994 and the Anti-Dumping Agreement; however, it did introduce at subparagraph (a)(ii) a particular standard of evidence. For 15 years (i.e., until the expiry of Section 15(a)(ii)), this particular standard of evidence modified the standard of evidence generally applicable to certain provisions in Article VI of GATT 1994 and the Anti-Dumping Agreement, as explained in the U.S. response to EU Question 16.

Question 16. The EU position is that the old Section 15 of China's Accession Protocol effectively *deemed it reasonable* to place a burden of proof on Chinese exporters to clearly show market economy conditions. This rule expired after 15 years, leaving one to fall back on the rule on burden of proof in Article 2 of the Anti-Dumping Agreement. We understand that China agrees, but asserts that the rule on burden of proof in Article 2 of the Anti-Dumping Agreement is "*irrelevant*" for the purposes of adjudicating this case. Please state and explain your views on this issue.

40. The final sentence of Article 2.4 of the Anti-Dumping Agreement is the only express reference to the term "burden of proof" found in the Anti-Dumping Agreement. According to Article 2.4, "[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."[52] Without more, importing Members must ensure that any burden of proof rules

[51] U.S. Responses to EU Questions 4 and 6, *supra*.

[52] Anti-Dumping Agreement, Art. 2.4.

they provide for or use, insofar as these are not otherwise provided for in Article VI of GATT 1994 or in the Anti-Dumping Agreement, are not unreasonable.

41. The 'old' and 'new' Section 15 contain the same basic elements (apply consistent with, in determining price comparability, domestic prices or costs in China, for the industry under investigation, market economy conditions, a methodology not based on a strict comparison). These basic elements do not expressly place the burden of proof on one subset of interested parties or another. That said, under the 'old' Section 15, if producers under investigation did not clearly show that market economy conditions prevail in the relevant industry, an importing Member would have had a sufficient evidentiary basis to reject domestic prices or costs in China. Under the 'new' Section 15, an importing Member can no longer rely on the failure of such producers to clearly show market economy conditions in the relevant industry as the sole basis for a determination to reject domestic prices or costs in China. Therefore, following the expiry of Section 15(a)(ii), a Member must have an adequate evidentiary basis for a determination to use a methodology that is not based on a strict comparison with domestic prices or costs in China in determining price comparability in anti-dumping proceedings involving Chinese products that are imported into a WTO Member after December 11, 2016.

42. The United States therefore agrees with the EU that the expiry of Section 15(a)(ii) means that the particular standard of evidence introduced in that subparagraph is no longer applicable and that after December 11, 2016, an importing Member must 'fall back' on the standard of evidence generally applicable in anti-dumping proceedings.[53]

Question 17. The EU position is that, notwithstanding the change in the rule on burden of proof that occurred on 11 December 2016, the provisions of the new Section 15 contain other language that continues to support the position of the European Union, on a stand-alone basis, and on a contextual basis, those arguments being made concurrently, independently and in the alternative. We understand that China's position is that the new Section 15 "*serves no purpose*". Please state and explain your views on this issue.

43. The United States agrees with the EU position that 'new' Section 15 continues to serve an important purpose. Please see the U.S. response to Panel question 7 for a full explanation of the U.S. views on this issue.

Question 18. The EU position is that the new Section 15 of China's Accession Protocol is not in the nature of an *affirmative defence*. We understand that China agrees. Please state and explain your views on this issue.

[53] Canada and Mexico have argued that Section 15(a)(ii) "creates a presumption against the Chinese producers under investigation" and that this presumption is no longer applicable after the expiry of this subparagraph. Canada's Oral Statement at the First Substantive Meeting of the Panel, paras. 3, 25, 29-30, 39; Declaración oral de México, para. 21. The United States believes that Canada's and Mexico's articulation of the meaning of Section 15(a)(ii), as well as their articulation as to the meaning of its expiration, coincides with positions expressed by the United States and the European Union.

44. The United States agrees with the EU position that Section 15 is not in the nature of an affirmative defense that a responding Party must bring forward.[54] The text of Section 15 uses no language expressing that it is an exception or derogation from Article VI of GATT 1994, the Anti-Dumping Agreement, or the SCM Agreement. Indeed, other than the particular standard of evidence described in Section 15(a)(ii),[55] the text of Section 15 serves to confirm that "[i]n determining price comparability *under* Article VI of GATT 1994 or the Anti-Dumping Agreement,"[56] an importing Member may reject and replace an industry's prices or costs when market economy conditions do not prevail. Therefore, Section 15 cannot be considered an exception, in the nature of an affirmative defense, with respect to the obligations set out in Article VI of GATT 1994, but rather, like the Second Note *Ad* Article VI:1, it is an elaboration of the obligations by which all Members have agreed to be bound pursuant to Article VI.

Question 19. We understand that China's position is that the provisions concerning the determination of price comparability in Article VI of the GATT 1994 and the Anti-Dumping Agreement on the one hand, and Section 15(a) on the other hand, contain *separate* obligations. The EU position is that all of these provisions must be read together as a whole, as an amalgam or *compound*. We point in this respect to the precise treaty terms in Section 15, which refer to "In determining price comparability …", which we consider means that, *in complying with the obligations* concerning price comparability in Article VI of the GATT 1994 and the Anti-Dumping Agreement, an investigating authority must also ensure, *simultaneously*, that it complies with the language of Section 15. Please state and explain your views on this issue.

45. The basic requirement of comparability, which predates Section 15, flows from Article VI of GATT 1994 and is further reflected in Article 2 of the Anti-Dumping Agreement. Understood correctly, Article VI establishes that the dumping comparison requires comparable, market-determined prices. Without a "comparable price, in the ordinary course of trade," no dumping comparison can be made. This "comparable price, in the ordinary course of trade" is a market-determined price. Accordingly, Section 15 clarifies the view of WTO Members (consistent with the earlier views of the GATT CONTRACTING PARTIES) that it is appropriate to reject and replace domestic prices or costs in determining price comparability if "market economy conditions do not prevail" in the industry or sector under investigation. Therefore, the United States agrees with the EU position that, for purposes of a dumping comparison, Section 15 of China's Accession Protocol, GATT 1994 Article VI, and the Anti-Dumping Agreement all concurrently call for "comparable prices" that are market-determined to determine normal value.[57]

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[54] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 8.6-8.7.

[55] See U.S. Responses to EU Questions 15 and 16, *supra*.

[56] Italics added.

[57] U.S. Responses to EU Questions 12-15; U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Sections 2 and 8.